



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Quantum Construction, Inc.

File: B-255049

Date: December 1, 1993

James F. Nagle, Esq., Oles, Morrison & Rinker, for the protester.

Amy M. Steed, Esq., and Garrett L. Ressing, Esq., Department of the Navy, for the agency.

Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly determined a bid bond was defective and the bid therefore nonresponsive where the surety's power of attorney authorizing the named attorney-in-fact to sign the bid bond on the surety's behalf contained an undated certification that the power of attorney had not been revoked, raising the question of whether the power of attorney could have been revoked prior to the execution of the bid bond.

DECISION

Quantum Construction, Inc. protests the rejection of its bid as nonresponsive and the award of a contract to P & L General Contractors, Inc. under invitation for bids (IFB) No. N44255-93-B-4939, issued by the Department of the Navy for an addition to an existing building and construction of indoor playing courts at Naval Air Station Whidbey Island, in Oak Harbor, Washington.

We deny the protest.

The agency received seven bids on the August 10, 1993, extended bid opening day. Quantum submitted the apparent low bid of \$193,193, and P & L was second-low with a bid of \$196,300.

Along with its bid, Quantum submitted the required bid bond on Standard Form 24. The bond was dated August 10, 1993, and signed by Holly Ulfers as attorney-in-fact for the surety, Insurance Company of the West. The bond was accompanied by a power of attorney from the surety listing

Holly Ulfers as an attorney-in-fact.¹ The power of attorney was signed by a senior vice president of the surety and notarized on February 26, 1992; however, the certification provision in the power of attorney--by which the vice president of the surety was to certify that the power of attorney remained in full force and effect and had not been revoked--was not completed. The vice president of the surety had signed his name on the signature line, and a seal was affixed to the certification, but the certification was undated. This raised the issue of whether the power of attorney could have been revoked prior to the execution of the bid bond, and caused the Navy to question whether Quantum's bid bond bound the surety. Consequently, the Navy rejected Quantum's bid as nonresponsive and made award to P & L on August 31.

Quantum filed an agency-level protest on September 3, arguing that the agency improperly rejected its bid as nonresponsive because an undated certification on a power of attorney accompanying a bid bond is a waivable minor informality. After the agency denied this protest, Quantum filed the instant protest in our Office, reasserting the argument rejected by the agency.

When required by a solicitation, a bid bond is a material part of the bid which must be furnished with it. A.D. Roe Co., Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194. The bid bond secures the surety's liability to the government, thereby providing funds to cover the excess costs of awarding to the next eligible bidder in the event that the bidder awarded the contract fails to fulfill certain obligations. See A.W. and Assocs., Inc., 69 Comp. Gen. 737 (1990), 90-2 CPD ¶ 254. Under the law of suretyship, no one incurs a liability to pay the debts or to perform the duties of another unless that person expressly agrees to be bound. Andersen Constr. Co., Rapp Constructors, Inc., 63 Comp. Gen. 248 (1984), 84-1 CPD ¶ 279.

When a bidder supplies a defective bond, the bid itself is rendered defective and must be rejected as nonresponsive. Minority Enters., Inc., B-216667, Jan. 18, 1985, 85-1 CPD ¶ 57. A bid bond's sufficiency depends on whether the surety is clearly bound by its terms. Truesdale Constr. Co., Inc., B-213094, Nov. 18, 1983, 83-2 CPD ¶ 591. The determinative question as to the acceptability of a bid bond is whether the bid documents establish that the bid is enforceable against the surety should the bidder fail to

¹A power of attorney is evidence that the named attorney-in-fact is authorized to sign the bid bond on the surety's behalf, binding the surety to the bond's terms.

meet its obligations. A.W. and Assocs., Inc., supra. If the agency cannot determine definitively from the documents submitted with the bid that the surety would be bound, the bid is nonresponsive and must be rejected. Id.

A bid bond submitted with an invalid power of attorney may render the bid nonresponsive.² See, e.g., Fred Winegar, B-243557, Aug. 1, 1991, 91-2 CPD ¶ 111; Baldi Bros. Constructors, B-224843, Oct. 9, 1986, 86-2 CPD ¶ 418. This is so because a power of attorney authorizes the agent to act for the surety and only a valid power of attorney would indicate that the surety expressly agreed to be bound to pay the bond signed by the attorney-in-fact. This express agreement to be bound is required under the law of suretyship. See Andersen Constr. Co.; Rapp Constructors, Inc., supra. A power of attorney is to be strictly construed. See J.W. Bateson Co., Inc., B-189848, Dec. 16, 1977, 77-2 CPD ¶ 472. We will not convert ambiguous aspects of powers of attorney into mere matters of form which can be explained away and waived. A.W. and Assocs., Inc., supra.

The certification section of the power of attorney submitted by Quantum was undated. As discussed above, this section certifies that the power of attorney is in full force and effect, and has not been revoked. Since the certification section was undated, the question was raised as to whether the power of attorney could have been revoked between the date of its execution, February 26, and the date of the bid bond's execution, August 10. That is, as of the time of bid opening, it was not clear, from the face of the bid, that Holly Ulfurs was authorized to bind the surety.

The surety's power of attorney must establish unequivocally that the attorney-in-fact who signed the surety's bond was authorized to bind the surety. Standard Roofing USA, Inc., B-245776, Jan. 30, 1992, 92-1 CPD ¶ 127. Here, because the certification was undated, the contracting officer could not be certain that the power of attorney remained in full force and effect; the missing date meant that the power of attorney did not establish unequivocally that the agent was authorized to bind the surety. Given the undated certification and its possible consequences, there was an open question at bid opening whether the surety could escape liability by claiming the bonding agent's authority to


²A power of attorney is a written authorization used to evidence an agent's authority to a third person.

³ Am. Jur. 2d Agency § 23 (1964).

execute the bond had been revoked prior to August 10. See Fred Winegar, supra.³

Quantum contends that our decision in J.W. Bateson Co., Inc., supra, established that the lack of a date on the certification of the surety's power of attorney is a waivable minor informality. The protester's reliance on this case, under these circumstances, is misplaced. In Bateson, the bid bond was executed not by a bonding agent--whose authority derives from the surety through a power of attorney--but by an officer (an assistant secretary) of the surety, and delivered under corporate seal. In that case, we found the lack of a date on the certification of the surety's power of attorney a waivable informality since the government was adequately protected by a bond under seal executed by an officer of the surety which correctly identified the solicitation and the principal. See A.W. and Assocs., Inc., supra. Here, the contracting officer at bid opening was confronted with a bid bond that was executed by an attorney-in-fact whose authority to bind the surety arises from the power of attorney, not from any status as a corporate officer of the surety.⁴

The protest is denied.


for James F. Hinchman
General Counsel

³The fact that the certification is sealed is not dispositive, since a corporate seal merely attests to or authenticates the signature. William V. Walsh Constr. Co., Inc., B-241257, Oct. 3, 1990, 90-2 CPD ¶ 270.

⁴Other cases cited by Quantum in support of its position involve missing or erroneous information on bid bonds themselves, not on powers of attorney. As a result, they are inapplicable, as they do not address the issue of whether the power of attorney unequivocally establishes the authority of the attorney-in-fact to bind the surety.